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IN THE

Supreme Court of the United States

OCTOBER TERM, 1964.

No. 928

D. GORDON RUPE AND SYLVAN LANG, INDIVIDUALLY AND AS TRUSTEES UNDER A TRUST AGREEMENT DATED AUGUST 31, 1937, AND SAN ANTONIO CORPORATION, A DELAWARE CORPORATION,

Petitioners.

vs.

HELEN G. WALLACE, PAULINE HIRSCHBERG, NORMAN ASHER, DAVID HORWICH, MINNIE G. HORWICH AND ARNOLD I. SHURE,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE APPELLATE COURT OF ILLINOIS, FIRST DISTRICT.

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IN THE

Supreme Court of the United States

OCTOBER TERM, A. D. 1965.

No. .....

SAMUEL C. LURIE AND JOSEPHINE LURIE,

Plaintiffs,

vs.

D. GORDON RUPE AND SYLVAN LANG, INDIVIDUALLY AND AS TRUSTEES UNDER A TRUST AGREEMENT DATED AUGUST 31, 1937, AND SAN ANTONIO CORPORATION, A DELAWARE CORPORATION,

Petitioners,

HELEN G. WALLACE, PAULINE HIRSCHBERG, NORMAN ASHER, DAVID HORWICH, MINNIE G. HORWICH AND ARNOLD I. SHURE,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE APPELLATE COURT OF ILLINOIS, FIRST DISTRICT.

THE OPINION BELOW.

The opinion of the Appellate Court of Illinois of which review is sought in this case is reported as *Lurie* v. *Rupe,* 51 Ill. App. 2d 164. That opinion is reprinted as Appendix I to this Petition, pp. 1a to 14a.

THE GROUNDS ON WHICH THE JURISDICTION OF THIS COURT IS INVOKED.

The Date of the Judgment Sought To Be Reviewed and the Time of Its Entry.

The date of the judgment of the Appellate Court of Illinois sought to be reviewed and the time of its entry is August 14, 1964. Said judgment, reprinted as Appendix II to this Petition, pp. 15a to 16a, was entered on rehearing and became final on November 23, 1964 upon the denial of leave to appeal by the Supreme Court of Illinois. Appendix III, pp. 17a to 19a.

The Statutory Provision Conferring on This Court Jurisdiction to Review the Judgment in Question.

This Court's jurisdiction to review the judgment in question is conferred by Section 1257 of the Judicial Code (28 U. S. C. § 1257).

THE QUESTION PRESENTED FOR REVIEW.

The question presented for review is:

The only contact of San Antonio Corporation with the State of Illinois was the appointment of Chicago Title and Trust Company as its transfer agent and registrar on August 30, 1947.

The only contact with Illinois of the trustees of the voting trust, whose sole asset consists of approximately 85% of the issued and outstanding shares of San Antonio Corporation, was the appointment of Chicago Title and Trust Company as its transfer agent on August 31, 1937 pursuant to an order of the Seventy-third District Court of Bexar County, Texas in a reorganization proceeding involving the predecessor in name of San Antonio Corporation.

Chicago Title and Trust Company thereupon performed its duties as set forth in such appointments.

The question is whether the application of Section 17 of the Illinois Civil Practice Act to uphold personal jurisdiction over the petitioners, nonresidents of Illinois, violates the due process clause of the Fourteenth Amendment to the Constitution of the United States

THE CONSTITUTIONAL PROVISION INVOLVED.

SECTION 1. FOURTEENTH AMENDMENT.

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

THE STATUTE INVOLVED.

Section 17 of the Illinois Civil Practice Act, Ill. Rev. Stat. 1963, Ch. 110, § 17.

(1) Any person, whether or not a citizen or resident of this State, who in person or through an agent does any of the acts hereinafter enumerated, thereby submits said person, and, if an individual, his personal representative, to the jurisdiction of the courts of this State as to any cause of action arising from the doing of any of said acts:

(a) The transaction of any business within this State;

(b) The commission of a tortious act within this State;

(c) The ownership, use, or possession of any real estate situated in this State;

(d) Contracting to insure any person, property or risk located within this State at the time of contracting.

(2) Service of process upon any person who is subject to the jurisdiction of the courts of this State, as provided in this section, may be made by personally serving the summons upon the defendant outside this State, as provided in this Act, with the same force and effect as though summons had been personally served within this State.

(3) Only causes of action arising from acts enumerated herein may be asserted against a defendant in an action in which jurisdiction over him is based upon this section.

(4) Nothing herein contained limits or affects the right to serve any process in any other manner now or hereafter provided by law.

STATEMENT OF THE CASE.

The facts relied on by petitioners for reversal of the judgment below are as follows:

The record conclusively establishes that the sole contact petitioners had with Illinois is that Chicago Title and Trust Company was made transfer agent of the voting trust some twenty-five years prior to the commencement of this lawsuit pursuant to court order, and registrar and transfer agent of San Antonio Corporation. The only duties performed by Chicago Title and Trust Company (hereinafter referred to as "Chicago Title"), on behalf of San Antonio Corporation, were transferring and registering its stock, mailing dividends to its stockholders when the same were declared by the corporation, maintaining lists of stockholders and sending out mailings to stockholders when requested so to do by the corporation. All of the mailings to stock-

holders were prepared and printed in Texas and forwarded to Chicago Title solely for the purpose of mailing (Record, pp. 14 to 20). The dividend checks specified that Chicago Title acted through a "distributor account."

The activities of Chicago Title as transfer agent of the voting trust were similarly confined to the ministerial duties of executing and issuing voting trust participation certificates, delivering such certificates when so instructed by the trustees, maintaining current lists of certificate holders, mailing notices to certificate holders when instructed to do so by the trustees, exchanging certificates for shares of stock of San Antonio Corporation and mailing dividends to certificate holders upon receipt thereof from San Antonio Corporation in Texas. Again, all notices and other mailings were prepared and printed in Texas and forwarded to Chicago Title only for the purpose of mailing (Record, pp. 22 to 25).

None of the normal indicia of transacting business was performed by the defendants in Illinois. They did not maintain any bank accounts or own or lease any real estate in Illinois. They paid no taxes nor maintained telephone or building directory listings in Illinois. They did not conduct the official business of the voting trust or the corporation, or, in the case of the voting trustees, any personal business, in Illinois. Chicago Title did not participate nor was it authorized to participate in deliberations of the voting trust, voting trustees or San Antonio Corporation. All deliberations of San Antonio Corporation and the trustees and the administration of the trust took place in Texas. All of the trust assets, being common stock of San Antonio Corporation, a Delaware corporation, were located either in Texas or Delaware. The certificates of stock, however, were physically held in Illinois by Chicago Title pursuant to the terms of the trust (Record, p. 26).

San Antonio Corporation was not qualified to do business in Illinois. All of its officers and directors were residents of Texas and conducted the corporation's business solely in Texas; no meetings were ever held or had ever been held in Illinois. The corporation's main activity at the time of suit was the ownership of stock in certain subsidiary corporations, all of the business affairs of which were conducted in Texas. From 1942 to 1959, the corporation owned and operated the City of Antonio bus lines, which it sold on May 1, 1959. The proceeds of the sale were used to purchase the common stock of American Desk Manufacturing Co., a Texas corporation, none of the business of which was conducted in the State of Illinois (Record, pp. 14 to 16).

Plaintiffs, who did not appeal from the decision of the trial court, filed suit in the Circuit Court of Cook County, Illinois, as owners and holders of certificates of beneficial interest in the voting trust. The complaint alleged that the voting trust had been improperly extended, that the sale of the transit lines by San Antonio Corporation, which had been authorized by a vote of its stockholders, including the voting trustees, violated the voting trust because the plaintiffs received no notice of such sale, and that the proceeds of the sale should not have been reinvested in the stock of American Desk Manufacturing Co. (Record, pp. 1 to 10).

Petitioners appeared specially and moved to quash service of process. On November 6, 1961 the trial court denied the motion, thereby raising for the first time the constitutional question here involved. On January 2, 1962, pursuant to the motion of petitioners, the complaint was dismissed and on the thirtieth day after such dismissal respondents sought to intervene. The intervening petition adopted the complaint filed by the plaintiffs. On February 5, 1962 the trial court denied respondents' petition for leave to intervene and to vacate the order of dismissal. There-

after, respondents appealed to the Appellate Court of Illinois from the decisions of the trial court rendered on February 5, 1962 and January 2, 1962, and petitioners filed a cross-appeal from the decision of the trial court rendered on November 6, 1961, denying the motion to quash service of process.

In their briefs before the Appellate Court of Illinois, petitioners argued that the mere use of financial institutions in Illinois to facilitate intracorporate security transfers did not constitute the transaction of business in Illinois within the context and meaning of Section 17 of the Illinois Civil Practice Act and that, under the facts of this case, the application of Section 17 to sustain the extraterritorial jurisdiction of the Illinois courts over petitioners violated the Fourteenth Amendment to the Constitution of the United States. The Appellate Court of Illinois held that Section 17 empowered the Illinois court to exercise such jurisdiction and that to do so fell short of the bounds of Federal due process (App. I, pp. 1a to 9a).

The Federal question raised by petitioners in the Appellate Court of Illinois was preserved and reasserted by petitioners in their petition for leave to appeal to the Supreme Court of Illinois, which petition was denied.

The Decision of the Appellate Court of Illinois.

The Appellate Court of Illinois recognized that all of the "primary illegal activities complained of occurred physically in the State of Texas" (App. I, p. 4a). It conceded that "the duties of a transfer agent are ministerial subsidiary financial duties often performed in a foreign state due to the requirements of a stock exchange or as in this case under court order" (App. I, p. 6a). It found that Chicago Title, the transfer agent, was "an independent organization" and that "[t]here is no profit

motive or increased sales because San Antonio Corporation employs Chicago Title and Trust" (App. I, p. 7a). It allowed that "it might easily be said that the activities of a transfer agent are not of a qualitative nature" sufficient to impose jurisdiction "in a case having no connection with the internal administrative and financial arrangements of a corporation" (App. I, p. 7a).

Nevertheless, the court in this case held that the alleged causes of action centered around the purported manipulation and perpetuation of the voting trust and that the activities of the transfer agent were "intimately connected" thereto. The only "facts" referred to by the court to sustain the "intimate connection" were that the activities of the transfer agent in this State "were part of the machinery necessary to perform the alleged manipulation and extensions," Chicago Title was a "party" to the extension agreements, and the corpus of the voting trust, being the shares of stock in San Antonio Corporation, was deposited with the transfer agent here (App. I, p. 8a).

Despite the fact that the Appellate Court of Illinois apparently felt that these activities were secondary only, it erroneously concluded they were sufficiently connected to the alleged causes of action to warrant the imposition of jurisdiction.

REASON RELIED UPON FOR THE ALLOWANCE OF THE WRIT OF CERTIORARI.

THE DECISION OF THE APPELLATE COURT OF ILLINOIS IS NOT IN ACCORD WITH THE APPLICABLE DECISIONS OF THIS COURT.

The decision of the Appellate Court of Illinois is in direct conflict with the many decisions of this Court relative to measuring the boundaries of due process of law. In *McGee* v. *International Life Insurance Co.*, 355 U. S. 220, this Court placed special emphasis on the importance of the "economic activity" engaged in by the defendant. *Id.*, at 223. Indeed, in every case decided by this Court upholding jurisdiction from and after *International Shoe Co.* v. *Washington*, 326 U. S. 310, the defendant engaged in some sort of commercial activity by which it could be said that such acts were calculated to produce a monetary gain. E.g., *Traveler's Health Association* v. *Virginia*, 339 U. S. 643; *Perkins* v. *Benguet Consolidated Mining Co.*, 342 U. S. 437. Yet, in the instant case, the Appellate Court of Illinois held that the absence of such commercial activity was irrelevant, inapplicable and insufficient to deny jurisdiction.

Moreover, the court ignored all of the many other factors suggested by this Court from time to time in the cases cited above. If conducted in Illinois, this litigation cannot be said to depend on "local facts" to be judged by "local law." There is an alternative forum available to respondents to litigate the claims here presented. The evidence necessary to decide the contest is in Texas. The sale of the transit system and the reinvestment of the proceeds took place in Texas. All actions of the officers, directors and stockholders of San Antonio Corporation, in-

cluding the voting trustees, occurred in Texas. The sale and purchase involved assets located in Texas. The various contracts involved were executed and performed in Texas and the buyer of the bus lines and the seller of the common stock of American Desk Manufacturing Co. were located in Texas. All votes of the voting trustees took place in Texas. The consents of the voting trust participating certificate holders took place in Texas and the extensions of the voting trust took place in Texas.

I.

THE APPELLATE COURT OF ILLINOIS RELIED UPON A TEST EXPRESSLY REJECTED BY THIS COURT.

Why then did the Appellate Court of Illinois uphold jurisdiction over these petitioners? It did so solely because of a vague and amorphous relationship between the activities of the transfer agent and the alleged causes of action (App. I, pp. 7a and 9a). This test, however, is in direct conflict with that set forth in *Hanson* v. *Denckla*, 357 U. S. 235. In that case this Court held that *the crucial test is the sufficiency of contacts between the nonresident defendants and the state of the forum, not the sufficiency of the relationship of the subject matter of the litigation to the forum state.*

The instant case is closely analogous to *Denckla*, which necessarily must be examined in detail and wherein it was held that *the assertion of jurisdiction over the defendants in that case violated due process.* The *Denckla* case involved a trust, as does this case. The trust was created in a jurisdiction (Delaware) other than the state in which the litigation took place (Florida). In the case at bar it was Texas and Illinois. The trust corpus was composed of securities, as in this case. In addition, the issue in *Denckla* was the validity of the trust, one of the issues in-

volved in the instant case. In *Denckla,* however, the securities were located in Delaware, whereas here the certificates of stock were deposited in Illinois with the transfer agent.

Thus far the only difference between the two cases is the physical location of the stock certificates. In this connection this Court in *Denckla* discussed in rem jurisdiction and noted that the parties assumed that the trust assets were situated in Delaware and not in Florida. The basis for the Court's acceptance of that assumption was set forth in a footnote, wherein it was pointed out that the documents evidencing ownership of the trust property were held in Delaware by a Delaware trustee who was the record owner of the stock and the trust instrument was executed in Delaware. *Hanson* v. *Denckla,* 357 U. S. 235, 247, n. 17. In the instant case the certificates were held in Illinois by the agent of the Texas co-trustees who were the record owners and the trust instrument was executed in Texas.

The Appellate Court of Illinois, however, invoked in personam jurisdiction over the voting trustees, *not in rem jurisdiction over the trust assets.* Thus, it can make little difference where the stock certificates were physically located. "Properly speaking such assets are intangibles that have no physical location." *Hanson* v. *Denckla,* 357 U. S. 235, 247, n. 16. If anywhere, the situs of stock certificates is in the state of incorporation, irrespective of where the corporation conducts its business and its books and records of transfer are kept. *Harris* v *Chicago Title and Trust Co.,* 338 Ill. 245, 257-58. Moreover, the depositing of the certificates with the transfer agent in Illinois was merely incidental to the performance of the transfer agent's duties. Of itself it adds nothing to the nature and quality of the activity of the transfer agent and can not, therefore, constitute an independent reason for imposing jurisdiction

as the Appellate Court of Illinois mistakenly said (App. I, p. 8a).

Accordingly, the only "contact" of the defendants with this State is the sole fact of the appointment of the transfer agent, no more and no less. That this one act is an insufficient affiliation with Illinois is amply supported by the *Denckla* case. In *Denckla*, the trustee remitted the trust income to the beneficiary in the forum state. Likewise, the co-trustees in this case disbursed dividends to the Illinois participating certificate owners through the medium of the transfer agent. In the former case the beneficial owner executed in Florida two powers of appointment of the trust res, while in the case at bar the beneficiaries twice executed the necessary consents in Illinois to the extensions of the voting trust.

Indeed, in *Denckla*, the beneficiary performed acts in Florida directly related to the income of the trust. She changed the compensation of the trust advisor, without whose consent the trustee could not make investments or sell trust assets, and she revoked the trust as to $75,000, returning that amount to the trustee in Delaware. These acts were characterized by this Court as qualitatively tantamount to the all-important commercial activity. "From Florida Mrs. Donner carried on several bits of trust administration that may be compared to the mailing of premiums in McGee." *Hanson* v. *Denckla*, 357 U. S. 235, at page 252 (referring to *McGee* v. *International Life Ins. Co.*, 355 U. S. 220). ***But it was held that such activity must have been performed by the trustee to sustain jurisdiction.***

Neither the trustees nor the transfer agent in the case at bar parformed any such activities in Illinois. All mailings were prepared and printed in Texas and forwarded to Chicago Title for posting purposes only. No part of the official business of the voting trust was conducted in

Illinois, nor did any actions of the voting trust or voting trustees take place in Illinois. Thus, there is nothing in this case even remotely comparable to the business activity present in all cases upholding jurisdiction. In short, the "ministerial subsidiary financial duties" of the transfer agent, the appointment of which was designed to facilitate intracorporate security transactions pursuant to court order and not to produce a monetary gain, are not such as will warrant imposition of jurisdiction over these petitioners.

Such appointment does not satisfy the requirement of due process that "there be some act by which the defendant purposefully avails itself of the privilege of conducting activities within the forum state, thus invoking the benefits and protections of its laws." *Hanson* v. *Denckla*, 357 U. S. 235, at page 253. The Appellate Court of Illinois made much of the fact that petitioners employed a transfer agent in Illinois for many years "and to that extent they have been protected by our laws" (App. I, p. 9a). Petitioners respectfully submit, however, that in no way have the laws of Illinois protected their interests. *Indeed, the activities of petitioners in Illinois, being limited to the mere maintenance of a transfer agent and registrar, did not arise from any privilege, protection or benefit that Illinois could have withheld.* As was stated by this Court in *Denckla*, at page 252:

> "But the record discloses no instance in which the *trustee* performed any acts in Florida that bear the same relationship to the agreement as the solicitation in McGee. Consequently, this suit cannot be said to be one to enforce an obligation that arose from a privilege the defendant exercised in Florida."

It is not surprising, therefore, that until the decision of the Appellate Court of Illinois in this case, it was generally

thought that the appointment of a transfer agent or registrar, either for the purposes of jurisdiction or qualification, was not considered to be transacting business by a foreign corporation. Model Business Corporation Act, § 99, par. 2(d); *Robbins* v. *Ring*, 166 N. Y. S. 2d 483, 9 Misc. 2d 44; *Joseph Walker & Sons* v. *Lehigh Coal and Navigation Company*, 167 N. Y. S. 2d 632; 8 Misc. 2d 1005.

Toledo Rys. & L. Co. v. *Hill*, 244 U. S. 49, is closely analogous to the case now before this Court. In the *Hill* case a resident of New York and a resident of Massachusetts sued an Ohio corporation in New York to recover the principal and interest of mortgage bonds issued by defendant. The defendant carried on its business of the operation of street railways and the furnishing of electrical energy for light and other purposes in Toledo, Ohio. However, the trustee under the mortgage indenture was located in New York and the bonds were delivered to the trustee in New York to be certified in accordance with the provisions of the mortgage. The bonds were subject to registry and were payable at the fiscal office of the corporation in New York. The semiannual interest coupons were also payable at the same office. It was held that the mere provision for a place of payment in New York of the bonds and coupons, and their actual payment at such place, did not mean that the defendant transacted business in New York for the purposes of personal jurisdiction.

II.

NONE OF THE MATERIAL EVENTS UPON WHICH THE ALLEGED CAUSES OF ACTION ARE BASED OCCURRED IN ILLINOIS.

Even if the sufficiency of the relationship of the subject matter of the litigation to the forum state were the proper test of the minimum contacts necessary to sustain jurisdiction, which we most assuredly deny, the activities of the transfer agent in this State had nothing at all to do with the causes of action asserted in the complaint. None of the material events upon which the alleged causes of action are based occurred in Illinois. The Appellate Court's statement that Chicago Title was a "party" to the trust agreement is not supported by the record. Chicago Title merely evidenced its acceptance of its duties as transfer agent on a page appended to the agreement which was not legally binding until authorized by the Texas court in the reorganization proceedings and filed in the corporation's principal office in Delaware pursuant to the General Corporation Law of Delaware.

The complaint alleges that the voting trust was amended by changing the expiration date to August 31, 1957 and on that date again amended to August 31, 1967. The complaint then concludes that there is no provision in the law or statutes in the State of Delaware for repeated extensions of voting trust agreements. The Appellate Court of Illinois characterized these allegations as being tantamount to "illegal perpetuation" of the voting trust. Whether or not such characterization proves to be true, (Section 218 of the Delaware General Corporation Law which this Court may take judicial notice of, provides that an original voting trust agreement may be extended and once extended it may be further extended), the *acts* com-

plained of were performed by the *trustees and beneficial owners*, not the *transfer agent*. Nowhere does the complaint allege any activities of the transfer agent connected with the extensions nor does the record in this case reveal any such acts and the Appellate Court of Illinois could not point to any.

The second cause of action alleged in the complaint concerns an alleged violation of a provision in the voting trust to the effect that the trustees could not vote for the sale of all or a major portion of the assets of San Antonio Corporation without first serving a 20-day written notice upon all holders of voting trust certificates. Such purported failure to serve the notice is expressly and specifically alleged to have been the fault of the voting trustees and not the transfer agent. Similarly, the third cause of action pertains to the failure of the trustees to distribute the proceeds from the sale of the transit system, purportedly in violation of the voting trust agreement. Again the fault, if any, was that of the voting trustees and not Chicago Title.

Thus, contrary to the statements of the Appellate Court of Illinois that the activities of the transfer agent were "intimately connected" to the causes of action and were "part of the machinery necessary to perform the alleged manipulations and extensions," the duties of Chicago Title were at best only incidental to and remote from the acts complained of and such acts, the court conceded, were performed in Texas.

In this connection the Supreme Court of Illinois has aptly stated in *Gray* v. *Amer. Radiator & Sanitary Corp.*, 22 Ill. 2d 432, at page 441, as follows:

> "An orderly and fair administration of the law throughout the nation requires protection against being compelled to answer claims brought in distant

States with which the defendant has little or no association and in which he would be faced with an undue burden or disadvantage in making his defense. It must be remembered that lawsuits can be brought on frivolous demands or groundless claims as well as on legitimate ones, and that procedural rules must be designed and appraised in the light of what is fair and just to both sides in the dispute. Interpretations of basic rights which consider only those of a claimant are not consonant with the fundamental requisites of due process."

Despite this admonition, the Appellate Court of Illinois exhibited an overzealous regard for the position of respondents only. The concepts of fair play and substantial justice which permeate the due process clause call for something more than the slightest tangential connection of a foreign corporation and voting trust with the forum state that does not arise out of their ordinary activities. To paraphrase Judge Learned Hand in *Hutchinson* v. *Chase & Giblert*, 45 F. 2d 139, at page 142:

> "None of this, and not all of it, seems to us a good reason for drawing the (petitioners) into a suit away from (their) home state. In the end there is nothing more to be said than that all the (petitioners') local activities, taken together, do not make it reasonable to impose such a burden upon (them)."

As Judge Hand concluded in *Hutchinson*, it is fairer that respondents should go to Texas than that the pefitioners should come to Illinois.

CONCLUSION.

For the reasons developed above, petitioners respectfully submit that this Court should grant certiorari in this case and reverse the judgments below.

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APPENDIX I.

The Opinion of the Appellate Court of Illinois.

48797

Samuel C. Lurie and Josephine Lurie,
Plaintiffs-Appellees,

vs.

D. Gordon Rupe and Sylvan Lang, Individually and as Trustees under a Trust Agreement dated August 31, 1937, and San Antonio Corporation, a Delaware corporation,
Defendant-Appellees and Cross-Appellants,

Helen G. Wallace, Pauline Hirschberg, Norman Asher, David Horwich, Minnie G. Horwich and Arnold I. Shure,
Appellants and Cross-Appellees.

} Appeal from Superior Court Cook County.

ON REHEARING.

Mr. Justice Bryant Delivered The Opinion Of The Court:

This is an appeal by petitioners-intervenors, Helen Wallace, Pauline Hirschberg, Norman Asher, David Horwich, Minnie Horwich and Arnold Shure, hereinafter referred to as petitioners, from an order entered in the Superior Court of Cook County on January 2, 1962, dismissing the complaint of the original plaintiffs, Samuel C. Lurie and Josephine Lurie, hereinafter referred to as plaintiffs, because (1) Sylvan Lang (defendant personally and as trustee) has not been served with process and is an indispensable party; and (2) complaint fails to state a cause of action since plaintiffs have failed to allege breach by defendants of any duty owing to

plaintiffs. Petitioners also appeal from an order entered on February 5, 1962, denying their petition for leave to intervene and their motion to vacate the order of dismissal entered January 2, 1962. Petitioners and plaintiffs are residents of this State. Petitioners have adopted the complaint of the plaintiffs and made it a part of the petition. The plaintiffs are not appealing the dismissal.

There is a cross-appeal by all defendants alleging that the Superior Court did not have jurisdiction over any or all of them collectively since they were all non-residents and none transacted business in Illinois and asking this court to reverse a portion of a decree entered on November 6, 1961, denying their motion to quash process on defendants, D. Gordon Rupe and San Antonio Corporation, a Delaware corporation.

This action was originally brought by plaintiffs for themsleves and all others similarly situated in a representative suit charging that the trustees of a voting trust which controlled 85% of the 383,569 authorized and outstanding shares of the corporation had violated the trust agreement by selling corporate assets without notice in violation of Article IV, Section 2 of the voting trust which requires 20 days written notice upon all holders of voting trust certificates; by illegally extending the trust agreement in direct violation of Article VIII, Section 1, which provides that the trust should terminate in ten years as of August 31, 1947; and by failing to distribute the proceeds of a total or partial liquidation of the corporation to the trust beneficiaries and shareholders of the corporation in violation of Article IX, Section 1, which provides that in the event of a total or partial liquidation the trustees shall receive the money, securities, rights or property and shall distribute the same among the holders of trust certificates in proportion to their interests, or the trustees may deposit such monies or property with the Chicago Title and

Trust Company as agent of the trustees with authority to make distribution thereof. Plaintiffs sought relief in damages against the trustees personally, sought to void the sale of the assets of the corporation, sought to void the alleged illegal extensions of the voting trust, and sought to force the trustees to distribute to the shareholders and certificate holders their fair share of the proceeds of the liquidation.

On February 1, 1962, a petition to intervene was filed, verified by Arnold I. Shure, a petitioner and attorney, stating among other things that the plaintiffs had compromised their interest in the suit and had sold their certificates prior to the entry of the order of January 2, which order was entered in violation of section 52.1 of the Civil Practice Act and erroneously adjudicated the rights of the plaintiffs and the class they purported to represent. If such order be allowed to stand the petitioners and the interests of the class would be bound.

San Antonio Corporation is an outgrowth by reorganization of Smith Young Tower Corporation. On August 31, 1937, a written voting trust agreement was entered into by and between the defendants, Sylvan Lang and D. Gordon Rupe, and such of the owners and shareholders who might become party thereto. The defendants, Lang and Rupe, are Vice-President and President of the corporation respectively, as well as trustees of the voting trust and directors of the corporation. The principal business of San Antonio Corporation is the ownership of stock in certain subsidiary corporations. Chicago Title and Trust Company has been appointed transfer agent of the corporation and the voting trust and has served in this capacity for many years. The shares of San Antonio Corporation, the physical corpus of the voting trust, are deposited in Chicago with the Chicago Title and Trust Company. Suit was commenced by service of process in Illinois upon

the Chicago Title and Trust Company and upon D. Gordon Rupe in Texas. Sylvan Lang was never served although a personal judgment is sought against him. Jurisdiction was properly quashed against Lang personally and no appeal has been taken from that order.

The voting trust was scheduled to expire on August 31, 1947. It was illegally extended by the trustees in 1947 and again in 1957. About May 1, 1959, the corporation entered into an agreement with the City of San Antonio, whereby it sold to the City assets consisting of the San Antonio Public Service Company, a franchise to operate buses for public transportation in the City of San Antonio and the necessary equipment for the operation of the bus line. The defendants without notice to the certificate holders thereupon purchased the common stock of American Desk Manufacturing Co., a Texas corporation, and actively commenced the business of manufacturing desks and school furniture.

Before considering the intervention question it is imperative to determine whether there are enough contacts present for the courts of Illinois to take jurisdiction over the defendants. There are three classes of defendants: San Antonio Corporation, the trustees, and Rupe as an individual. Personal jurisdiction is sought against all three based on different contacts with Illinois. The primary illegal activities complained of occurred physically in the State of Texas: illegal sale of assets, illegal voting and illegal manipulation.

Section 17 of the Civil Practice Act (Ill. Rev. Stat., c. 110, § 17) governs jurisdiction of the courts of this State and imposes jurisdiction on all persons whether or not a citizen or resident who perform any of four enumerated acts within the State. That the courts and legislature of a state have the power to phrase or interpret the jurisdic-

tional power of that state to a point short of the bounds of federal due process is well settled. *Perkins* v. *Benguet Consolidated Mining Co.*, 342 U. S. 437, 440 (1952); *Missouri P. R. Co.* v. *Clarendon Co.*, 257 U. S. 533, 535 (1922). Jurisdiction of the courts of Illinois has been limited for the present by the legislature of this State to the four enumerated acts set out in section 17 and to the pronouncements of the courts of this State interpreting that section. The case of *Kaye-Martin* v. *Brooks*, 267 F. 2d 394 (7th Cir. 1959) has interpreted that in order to impose jurisdiction because of "the transaction of any business within this State" the "cause of action must be based [solely] on events which occurred in Illinois." This interpretation was subsequently limited in the 1963 Historical and Practice Notes to the annotated statutes (S. H. A., 1963, c. 110, § 17) to the effect that:

> "It was not the purpose of subsection (3) of section 17 to limit the assertion of jurisdiction under the section to cases in which every element of the transaction on which the claim is based occurred within the State of Illinois . . . .
>
> Jurisdiction may exist under section 17 even though only some of the events upon which the cause of action is based occurred in Illinois, provided that those events amounted to the minimum contacts with the state which are essential to jurisdiction."

San Antonio Corporation has continuously and systematically transacted business in Illinois for the past seventeen years. It has maintained the Chicago Title and Trust Company as transfer agent, registrar, mailing agent and dividend disbursing agent of the stock held in the voting trust for the corporation in Illinois. Defendants rely on two New York cases: *Robbins* v. *Ring*, 166 N. Y. S. 2d 483 (1957); *Joseph Walker & Sons* v. *Lehigh Coal and Nav. Co.*, 167 N. Y. S. 2d 632 (1957). These cases quash jurisdic-

tion on two non-resident corporations where contacts were sought to be established through the activities of their New York transfer agents. The jurisdictional statute in effect in New York at the time of decision in these cases was not as broad as the comprehensive statute in effect in this State. We feel in no way bound by these cases. The test now is not the old "doing business" test but merely whether "minimum contacts" are present sufficient to allow the forum to assume jurisdiction. *Grobark* v. *Addo Machine Co., Inc.*, 16 Ill. 2d 426, 431, 441 (1959). It is quite true that the duties of a transfer agent are ministerial subsidiary financial duties often performed in a foreign state due to the requirements of a stock exchange or as in this case under court order. These are not relevant considerations under the Illinois law nor under the federal cases interpreting the limits of the due process clause. Both the United States Supreme Court and our own courts have laid down rules that the imposition of jurisdiction should depend upon the "quality and nature" of the forum contacts (*International Shoe Co.* v. *Washington*, 326 U. S. 310, 319 (1945)); whether defendant "engaged in some act or conduct by which he may be said to have invoked the benefits and protections of the law of the forum" (*Hanson* v. *Denckla*, 357 U. S. 235, 253 (1958); *Gray* v. *Amer. Radiator Corp.*, 22 Ill. 2d 432, 440 (1961); the test should not be "mechanical or quantitative" (*Nelson* v. *Miller*, 11 Ill. 2d 378, 384 (1957)); and the facts of each case determine the outcome (*Perkins* v. *Benguet Consolidated Mining Co.*, (*supra* at 445)).

In this case the relevant inquiry is whether San Antonio Corporation's activities in this State were of such a nature as to impose jurisdiction and whether any part of the cause of action arose in this State. The cause of action here centers around the illegal manipulation of a voting trust. The Chicago Title and Trust Company performed

activities as agent for both the corporation and the trustees intimately connected to the manipulation and perpetuation of the voting trust. While it might easily be said that the activities of a transfer agent are not of a qualitative nature in a case having no connection with the internal administrative and financial arrangements of a corporation, they are of a substantial qualitative nature here. *Grobark* v. *Addo Machine Co., Inc.* (*supra*) which quashed jurisdiction on a New York corporation because the two distributors in Illinois were independent businessmen selling their own merchandise which had been manufactured by Addo, does not apply here at all. It is true that Chicago Title and Trust Company is an independent organization doing business in Illinois. This, standing alone, is not a relevant factor. *Consolidated Cosmetics* v. *D-A Pub. Co.*, 186 F. 2d 906, 908 (1951). Chicago Title and Trust is the expressly appointed agent of the defendant, continuously entrusted with certain well defined duties which it would not perform unless directed to do so. There is no profit motive or increased sales because San Antonio Corporation employs Chicago Title and Trust, but this does not detract from the continuous business contacts betwen the two companies. In *Consolidated Cosmetics* v. *D-A Pub. Co.* (*supra*) a New York publisher used an independent Illinois printing company solely to qualify with the postal department for mailing second class matter. The court felt that the activities of printing and mailing in Illinois, "their extent and their continuity, their nature and their effect, were such inevitably as to constitute doing business in Illinois." (908)

The activities of the agent in this State were part of the machinery necessary to perform the allegedly illegal manipulations and extensions. Chicago Title and Trust Company was actually a party to the agreement illegally extending the voting trust. Furthermore the corpus of the

voting trust, the center of this controversy, is deposited with the agent here. We believe that these contacts occurring in Illinois are sufficiently related to the cause of action to impose jurisdiction.

Defendants have pointed out that Rupe has been sued personally and that therefore jurisdiction may not be imposed unless he was physically present in this State and performed here personally some of the activities out of which this cause of action arose. Rupe is being sued personally because under settled trust law a trustee is personally liable for certain of his acts. It is immaterial that the trustee is not personally at fault; the absence of blameworthiness on his part affects his right of indemnity out of the trust estate, but it does not affect his liability to third persons. III Scott on Trusts § 264 (2d ed. 1956); *Piff* v. *Berresheim*, 405 Ill. 617, 623 (1950). It is quite clear that Rupe's personal activities are immaterial to liability in this case. He stands or falls only upon his activities performed as trustee. In this connection if the trust has performed activities in Illinois sufficient to meet the tests of the inquiries outlined above, Rupe is subject to the power of the courts of this State and liable for a personal judgment whether or not he personally performed any acts within this State. Chicago Title and Trust Company has been agent for the Trust and for Rupe without interruption since 1937. Its activities for the trust are of substantially the same order as those performed for the corporation with the addition that it acted as despository for shares of San Antonio Corporation which comprised the body of the trust. In a case which did not involve administrative and financial issues connected with the duties and activities of the transfer agent there might not be substantial contact. There certainly is substantial contact here.

We believe that the necessary contacts have been established betwen this State and the defendants through continuous and substantial business activities with their transfer agent and depository. These same activities are sufficiently closely related with the cause of action to support jurisdiction personally. The defendants have employed an agent in this State for many years and to that extent they have been protected by our laws. Defendants have received adequate notice of the litigation. The basic requirements of fairness under the due process clause have been met.

The lower court dismissed plaintiffs' suit for two reasons: (1) a necessary and indispensable party had not been served; (2) complaint fails to state a cause of action since plaintiffs have failed to allege breach by defendants of any duty owing to plaintiffs.

Both trustees are necessary parties to this suit. The rule is as follows: "Wherever two or more co-trustees are thus jointly and severally liable in the same amount for a breach of trust which is not purely tortious in its nature,—as where it consists in a failure to carry out the directions of the trust, or a failure to make proper investments, or other like acts of omission or commission which are not fraudulent, or do not involve a willful breach of good faith, . . . in such cases, upon the general principles of equity pleading, all the trustees who are liable should be joined as defendants in a suit brought by the beneficiary; . . ." 4 Pomeroy, Equity Jurisprudence § 1081 (5th ed. 1941); Bogert, Trusts and Trustees § 871 (2d ed. 1962). In Illinois trustees are considered necessary and indispensable parties. *Hutchinson* v. *Ayres*, 117 Ill. 558, 567 (1886); *Anderson* v. *Elliott*, 1 Ill. App. 2d 448, 453 (1954); *White* v. *Macqueen*, 360 Ill. 236, 243 (1935). Here there were no allegations of fraud or willful breaches of good faith. Moreover the

breach of trust charged arises out of failures to carry out directions of the trust.

Section 25(1) of the Civil Practice Act (Ill. Rev. Stat., c. 110, § 25(1) provides in part:

> "If a complete determination of a controversy cannot be had without the presence of other parties, the court may direct them to be brought in. If a person, not a party, has an interest or title which the judgment may affect, the court, on application, shall direct him to be made a party."

In *Oglesby* v. *Springfield Marine Bank*, 385 Ill. 414, 429-430 (1944) the court stated:

> "We are, therefore, clearly of the opinion that when the instrument of April 22, 1925, was called to the attention of the court by the amended answer, the court should, of its own motion, have suspended all further proceedings in the cause until all of the parties interested in the subject matter of the alleged trust were made parties and properly brought before the court. . . ."

The Chancellor was aware of the existence of Sylvan Lang since the court had ruled in his favor on the motion to quash. The rule requiring that a necessary party whose interest will be affected by a final decree must be brought in ordinarily applies only where the court proceeds to a trial on the merits. *Oglesby* v. *Springfield Marine Bank*, (*supra* at 423). Whether a cause which has been dismissed after the pleader has elected to stand upon his complaint is a decision on the merits has not been decided in Illinois. A dismissal under such circumstances was a final order for purposes of perfecting an appeal under section 77 of the Civil Practice Act (Ill. Rev. Stat., ch. 110, § 77 (1961)); *Doner* v. *Phoenix Land Bank*, 381 Ill. 106 (1942); *Roddy* v. *Armitage-Hamlin Corp.*, 401 Ill. 605 (1949). Restatement, Judgments § 49 (1942) and comments thereafter would

seem to indicate that it was not a decision on the merits, however, because the judgment although final is based merely on rules of procedure rather than on rules of substantive law. We do not need to decide this question here, but, there is certainly enough doubt in the outcome that the lower court abused his discretion in dismissing the suit under the circumstances. The suit should not have been dismissed for lack of a necessary party when service easily could have been perfected.

There is no substance to the point that the complaint failed to state a cause of action. Paragraph 3 of the complaint stated that Lang and Rupe were trustees for the purpose of voting stock deposited with them. Paragraph 6 stated that Samuel Lurie and Josephine Lurie were owners and holders of certificates of beneficial interest in the voting trust and had purchased those certificates prior to the acts of breach charged. Paragraph 13 charged that the defendants were notified and demand was made that they perform their duty in compliance with various sections of the trust which were set up in the complaint. This established a sufficient cause of action against the trustees.

Paragraph 14 alleged that the action was brought for certificate holders and stockholders as a class; that their rights are identical and common questions of law and fact will govern and decide the rights; that the owners and holders of voting trust certificates and of stock in the corporation are numerous and live in various parts of the United States; that it would be impossible to join them; and that plaintiffs can and will fairly and adequately represent the rights and interests of all other owners. In *Oppenheimer* v. *Cassidy*, 345 Ill. App. 212, 221 (1951) where plaintiff, voting trust certificate holder, alleged that he brought an action for certificate holders and stockholders together and that their interests were the same, the court pointed out that an action is not representative

merely because the parties so designate it. Contrary to the facts in the *Oppenheimer* case plaintiffs have alleged and have not been challenged by other shareholders that they represented both shareholders and voting trust certificate holders. The theory of plaintiffs' case was that there was a clear breach of duty to the certificate holders in the non-compliance with the notice provisions of the voting trust. Correspondingly they allege a similar breach of management's fiduciary obligations to all the shareholders through the improper use of the voting trust to accomplish a sale of the corporate assets.

In *Eisner* v. *Davis*, 109 N.Y.S. 2d 504, 505-506 (1951) the court stated:

> ". . . No redress is sought for or on behalf of the corporation. The action herein, as the complaint plainly and clearly discloses, is a personal one, founded on a contract made with the defendant Davis to act as a trustee—as a voting trustee—for the common benefit of all of the parties to the agreement, including the plaintiffs; that he violated his duties and obligations to the plaintiffs pursuant to a conspiracy to wilfully injure them by violating his duties and obligations as such trustee resulting in injury and damage to them, and they seek a recovery therefor."

See 13 Fletcher, Cyclopedia Corporations §§ 5908, 5915 (1961); 1 Nichols Illinois Civil Practice § 281 (1961). The interests of the shareholders and certificate holders are identical and properly alleged so as to make out a proper class action. The complaint filed by the plaintiffs in this case set out a cause of action and was improperly dismissed. The cause should be reinstated upon remand.

There has been some discussion between petitioners and defendants in regard to whether this suit is a stockholders' derivative suit. A determination of this point is not necessary to dispose of this appeal. A representative class suit

has been properly set out and the members of that class would be bound by a decision on the merits.

Section 26.1 of the Civil Practice Act (Ill. Rev. Stat. c. 110, § 26.1) provides in part:

> "(1) Upon timely application anyone shall be permitted as of right to intervene in an action: (a) when a statute confers an unconditional right to intervene; or (b) when the representation of the applicant's interest by existing parties is or may be inadequate and the applicant will or may be bound by a judgment decree or order in the action; . . ."

The petition for intervention was filed on February 1, 1962. Petitioners alleged that they had no notice that their interests were not adequately represented prior to January 2, 1962, when an order dismissing plaintiffs' suit was entered because of their election to stand on the original complaint.

Where the petitioner's interest is identical with that of a party to the litigation his interest is adequately represented by that party. A petitioner's interest may be inadequately represented, although identical with the interests of the first parties, if the first party is not diligent in its prosecution or defense of the action. 84 ALR 2d 1421.

In *Duncan* v. *National Tea Co.*, 14 Ill. App. 2d 280, 297-300 (1957), a stockholder's derivative suit, the court held that the advanced age of the plaintiff and the fact that she had disposed of her stock in the corporation prior to the filing of the intervention petition supported the allegation that her representation of the intervenors' interests might be inadequate. See also *Malcolm* v. *Cities Serv. Co.*, 2 FRD 405 (1942); 84 ALR 2d 1438. In passing upon the merits of the petition to intervene the allegations set out in the petition must be taken as true. *HFG Co.* v. *Pioneer Pub. Co.*, 162 F. 2d 536, 540 (1947). Petitioners have alleged that the plaintiffs disposed of their stock and certi-

ficates prior to the dismissal of the suit and that the dismissal although involuntary on its face was in fact collusively procured by [illegible]r election to stand upon the complaint. There is no evidence in the record to the contrary. The petition on its face is sufficient to establish that the plaintiffs did not sufficiently represent the petitioners or the class at the time of the dismissal of the suit. The petition was timely since the petitioners came before the court soon after they discovered that they had been improperly represented. The argument that there now is no suit in which to intervene has been obviated since we have held that the suit was improperly dismissed.

This cause is remanded with directions to vacate the order of dismissal, allow the petitioners to intervene and to proceed on the merits. Accordingly the order of January 2, 1962, is reversed. The order of February 5, 1962, is reversed. The portion of the decree of November 6, 1961, appealed from by the cross-appellants is affirmed.

AFFIRMED IN PART, REVERSED IN PART AND REMANDED WITH DIRECTIONS.

FRIEND, *J.*, concurs
BURKE, *P. J.*, took no part.

APPENDIX II.

THE JUDGMENT OF THE APPELLATE COURT OF ILLINOIS OF AUGUST 14, 1964.

Samuel C. Lurie and Josephine Lurie,
Plaintiffs below,
Appellees

No. 48797 *vs.*

D. Gordon Rupe and Sylvan Lang, individually and as Trustees under a Trust Agreement dated August 31, 1937, and San Antonio Corporation, a Delaware Corporation,
Defendants below,
Appellees

Helen G. Wallace, Pauline Hirschberg, Norman Asher, David Horwich, Minnie G. Horwich, and Arnold I. Shure,
Intervening Petitioners below,
Appellants—Cross-Appelles

D. Gordon Rupe, Individually, and as Co-Trustee under a Trust Agreement dated August 31, 1937, and San Antonio Corporation, a Delaware corporation,
Cross-Appellants

} Appeal from Superior Court Cook County

The Court on a hearing of said cause doth order that:

The order entered January 2, 1962 in the Superior Court of Cook County, is REVERSED.

The order entered February 5, 1962 in the Superior Court of Cook County is REVERSED.

That portion of the decree entered November 6, 1961 and appealed from by the cross-appellants is AFFIRMED.

This cause is remanded with directions to vacate the order of dismissal, allow the petitioners to intervene, and to proceed on the merits.

Appellants and Cross-Appellees recover costs from Appellees and Cross-Appellants.

Execution may issue.

In which orders and judgment Presiding Justice Joseph Burke took no part.

APPENDIX III.

THE ORDER OF NOVEMBER 23, 1964 OF THE SUPREME COURT OF ILLINOIS DENYING LEAVE TO APPEAL.

UNITED STATES OF AMERICA

STATE OF ILLINOIS, } ss.
SUPREME COURT. }

AT A TERM OF THE SUPREME COURT, begun and held in Springfield on Monday, the ninth day of November in the year of our Lord, one thousand nine hundred and sixty-four, within and for the State of Illinois.

PRESENT: Ray I. Klingbiel, Chief Justice.

Justice Joseph E. Daily
Justice Harry B. Hershey
Justice Roy J. Solfisburg, Jr.
Justice Walter V. Schaefer
Justice Byron O. House
Justice Robert C. Underwood

William G. Clark, Attorney General

Robert G. Miley, Marshal

ATTEST: Mrs. Earle Benjamin Searcy, Clerk

BE IT REMEMBERED, that, to-wit: on the 23rd day of November 1964, the same being one of the days of the term of Court aforesaid, the following proceedings were, by said Court, had and entered of record, to-wit:

Samuel C. Lurie and Josephine Lurie,

No. 38854 *vs.*

D. Gordon Rupe and Sylvan Lang, individually and as Trustees, under a Trust Agreement dated Augus 31, 1937, and San Antonio Corporation, a Delaware corporation,

Petitioners,

Helen G. Wallace, Pauline Hirschberg, Norman Asher, David Horwich, Minnie G. Horwich and Arnold I. Shure,

Respondents.

Petition for Leave to Appeal from Appellate Court First District

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48799

And now on this day the Court having duly considered the Petition for Leave to Appeal herein as well as the record and abstract, filed in support thereof, and being now fully advised of and concerning the premises, doth overrule the prayer of the petition and denies Leave to Appeal herein.

And it is further considered by the Court that the said Respondents recover of and from the said Petitioners costs by them in this behalf expended, to be taxed, and that they have execution therefor.

I, MRS. EARLE BENJAMIN SEARCY, Clerk of the Supreme Court of the State of Illinois and keeper of the records, files and Seal thereof, do hereby certify that the foregoing is a true copy of the final order of the said Supreme Court in the above entitled cause of record in my office.

IN WITNESS WHEREOF, I have hereunto subscribed my name and affixed the Seal of said Court this 30th day of November, 1964.

/s/ MRS. EARLE BENJAMIN SEARCY,
Clerk, Supreme Court of the State of Illinois.

(SEAL)